its ruling to enforcement "*within the State of Georgia*. [Marsh] is therefore enjoined from enforcing [the agreement] against Meathe *in Georgia*." Pet. App. 43a (emphasis added) (citing *Keener v. Convergys Corp.*, 342 F.3d 1264, 1269 (11th Cir. 2003)). The district court declined to declare the non-compete agreement void outside of Georgia.

On appeal, the Eleventh Circuit affirmed the district court's application of Georgia law to the non-compete agreement, but reversed the district court's decision to the extent that the district court limited the geographic scope of its ruling to the territorial boundaries of Georgia. Relying upon Georgia law and federal common law,[4] the Eleventh Circuit determined that because "Georgia does not attempt to limit its declaratory judgments in cases involving non-competition agreements . . . [a] federal district court sitting in Georgia and applying Georgia law should not do so either." Pet. App. 21a-22a (citing, *inter alia*, *Hostetler v. Answerthink*, 599 S.E.2d 271, 275 (Ga. Ct. App. 2004)). The Eleventh Circuit thus declared the non-compete agreement void nationwide and called upon courts outside of Georgia to honor its determination under principles of collateral estoppel.

Under the Eleventh Circuit's application of *Erie*, a valid contract that is intended to regulate private commercial conduct nationwide and is fully enforceable under the law of 49 States can be completely negated if one party to the contract secures personal jurisdiction over the other contracting party in the 50th State and persuades that State's courts to invoke local public policy to nullify the instrument. In an increasingly fluid, technology-driven economy that finds corporations "doing business" everywhere, it is not difficult for enterprising plaintiffs to ensnare corporate

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4. Pet. App. 21a (stating that "an enforcing court should apply the law of the state courts").

defendants in virtually any forum of their choosing. Furthermore, unless reversed, the broader implications of the rule endorsed by the Eleventh Circuit are profoundly disruptive of interstate commerce.

Under the Eleventh Circuit's reasoning, a party to a contract that regulates conduct nationwide can contrive to bring suit in a State whose courts will void the contract in whole or in part, and project the forum State's judgment throughout the Nation, nullifying the agreement and stripping the other contracting party of the benefits of the bargain. In turn, this invites rampant forum shopping and a legal "race to the bottom," encouraging State legislatures and courts to create idiosyncratic havens where forum-shopping parties can seek to avoid obligations widely recognized and enforced in sister States. The threat of such abuses will force contracting parties to consider modifying both their contracting practices outside of those havens and their commercial presence within them in an effort to avoid their jurisdiction. Thus, because the rule endorsed by the Eleventh Circuit poses a grave threat to the integrity of interstate agreements, the rule necessarily and adversely affects the conduct of interstate commerce both pre- and post-adjudication.

II. Certiorari Should Be Granted Because The Eleventh Circuit's Reflexive, Nationwide Application Of Georgia Law Ignores The Inherent Limitations On A State's Authority To Impose Its Laws Extraterritorially

A. In Our Federal System, A State Has No Authority To Impose Its Legal Or Policy Judgments Nationwide

As one State Supreme Court has observed:

> [N]o state should impose its law in a situation when its parochial rules would unduly and without substantial reason so impinge upon another state as to interfere with the free flow of commerce or the exercise of another state's legitimate policies in such a manner that would invite retaliation from another jurisdiction.

Heath v. Zellmer, 151 N.W.2d 664, 672 (Wis. 1967). This Court has long since concluded that state "[l]aws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extra-territorial effect only by the comity of other states." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892). In particular, it is "impossible to permit the statutes of [a State] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914); *see also Gore*, 517 U.S. at 571 ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all the others in this particular.") (quoting *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881)); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons

or property would offend sister States and exceed the inherent limits of the State's power.").[5] Thus, regardless of the ambitions of State law, federal courts have a unique obligation to ensure that one State does not impose its law and public policy on the other 49 States or on the operation of interstate commerce.

In the field of contracts, the unique federal interest that makes extraterritorial application of a forum state's law inappropriate is particularly weighty where the forum state is a stranger to the contract in dispute.[6] After all, "[t]here is no necessary congruity between the basis for competence of a court and the basis for choice of law." *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690, 697 (E.D.N.Y. 1984); *see also Heath*, 151 N.W.2d at 672 ("Deference to the substantial interests of another state are necessary and for a state that is only minimally concerned with a transaction or tort to thrust its law upon the parties would be disruptive of the comity between states.").

To this end, the Court has pointed to the Due Process Clause and the Full Faith and Credit Clause as placing certain "restrictions on the application of forum law." *Phillips*

5. As this Court has explained, the principle that prohibits individual states from acting extraterritorially "is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound." *State Farm*, 538 U.S. at 421 (quoting *New York Life Ins. Co.*, 234 U.S. at 161) (internal quotations omitted).

6. Once the Court determines that the forum State's law should not be applied, the court has a choice to "consider whether to borrow existing state law principles or to 'resort to uniform federal rules.'" *United States v. Crown Equip. Corp.*, 86 F.3d 700, 706 (7th Cir. 1996) (quoting *United States v. Kimball Foods, Inc.*, 440 U.S. 715, 728-29 (1979)). Here, the strong federal interest in bolstering the predictability and stability of contracts in interstate commerce demands application of uniform federal rules.

Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985).[7] "These restrictions require[] that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* (citations and quotations omitted). Indeed, as the decision below amply demonstrates, "[i]f a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." *Id.* at 820 (quoting *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 337 (1981)) (internal quotations omitted).

For all of these reasons, the Eleventh Circuit should not have applied Georgia law, as it did, to *void* the non-compete agreement nationwide. And, the Eleventh Circuit certainly should not have relied on Georgia's idiosyncratic rule against non-compete agreements to dictate the parties' rights and obligations throughout the country. Georgia has neither a sufficient connection to the subject matter of the suit nor a "legitimate interest" in reaching beyond its territorial borders to void otherwise lawful commercial arrangements, and Georgia may not use its peculiar choice of law rule "as a means of imposing its regulatory policies on the entire

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7. The constitutional imperative to reject Georgia law in this case is not an attack on full faith and credit. The Full Faith and Credit Clause properly requires state courts to accept the judgments of their sister States. The extraterritorial impact of full faith and credit, however, adds a constitutional dimension to the anterior choice of law question, regardless of whether the question is framed in terms of (1) which State's law should be applied to the dispute; or (2) as in this case, whether a State rule of decision should be literally applied in light of the preclusive effects that will follow based on the manner in which the court's judgment is framed. This case illustrates the pernicious consequences that follow from reflexively applying the forum State's law without regard for the interstate ramifications of such application.

Nation." *Gore*, 517 U.S. at 585. Accordingly, certiorari should be granted to correct the Eleventh Circuit's decision to resolve the parties' dispute by imposing Georgia law beyond Georgia's borders.

B. The Eleventh Circuit's Decision Ignores The Unique Federal Interests Implicated By A Single State's Refusal To Enforce A Contract Involving Interstate Commerce That Is Both Valid And Enforceable Beyond The State's Borders

The Eleventh Circuit erred in reflexively applying Georgia law to void the non-compete agreement nationwide. It is, of course, a bedrock principle of federal law that *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), generally requires a federal court sitting in diversity to apply the substantive law of the forum state. *Erie*, however, is not an absolute command when there are important, countervailing federal interests at stake. Rather, this Court has made clear that certain "areas, involving *uniquely federal interests*, are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by . . . federal common law." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (internal citations and quotation omitted) (emphasis added).[8]

This Court's decisions heretofore have defined "unique federal interests" to include "the rights and obligations of

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8. The federal interest exception to the *Erie* doctrine has been characterized as serving "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). In this case, the Eleventh Circuit's refusal to contain the extraterritorial application of Georgia law *encourages* forum shopping and *inequitably* deprives Marsh of the benefit of its bargain in scores of States that would hold Respondents to the letter of the non-compete agreement

the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted). "In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Id.*

Thus, for example, in a case decided the same day as *Erie*, the Court relied on federal common law to resolve a dispute over the apportionment of interstate waters. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). In *Hinderlider*, the Court determined that reliance on state law was inappropriate even though the dispute was between two private litigants and the relevant States could not be joined. *Id.* As the Court later explained, the application of federal common law was necessary because "no State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (discussing *Hinderlider*, *supra*).

Here too, there is a unique federal interest in preventing one State from reforming or rescinding the terms and conditions of contracts involving interstate commerce through the application of parochial choice of law rules. The federal courts, as decisions such as *Gore* and *State Farm* make clear, have an overarching interest in enforcing the respect for state sovereignty that our constitutional design requires. This unique federal interest is reflected in congressional enactments as well. *See, e.g.*, 9 U.S.C. § 2 (Federal Arbitration Act) ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of

such contract or transaction, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").[9]

There is a stark difference between a State's refusal, on the one hand, to *enforce* within its borders a contractual provision that violates the State's public policy, and a State's decision, on the other hand, to declare that a contractual provision is void *ab initio*. And, absent any defect in contract formation, a State's attempt to project its invalidation of an out-of-state contract on the entire Nation based on its own public policy considerations certainly exceeds all constitutional bounds.

Consequently, regardless of whether the problem presented here is characterized as one that calls for the application of federal common law to restrain the application of a Georgia rule of decision beyond the State's territorial authority to regulate, or a simple refusal to void an interstate contract when, at most, a State can refuse to *enforce* an otherwise valid interstate contract within its borders, there is an overriding federal interest in ensuring that Georgia's idiosyncratic refusal to enforce non-compete agreements is not accorded nationwide effect.

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9. On this record, there can be no doubt that the contract at issue comprehended "a transaction involving commerce" as Congress defined that concept in the Federal Arbitration Act. *See, e.g., Shearson Hayden Stone, Inc. v. Liang*, 493 F. Supp. 104, 106 (N.D. Ill. 1980) (explaining that a "contract between a . . . brokerage firm and its employee is a contract involving interstate commerce governed by the Act"), *aff'd*, 653 F.2d 703 (7th Cir. 1981).

C. The Eleventh Circuit's Imposition Of Georgia Law And Policy On The Entire Nation Violates The Commerce Clause.

As a separate and independent check on the power of individual States to impose their will extraterritorially, the Commerce Clause bars Georgia from imposing its idiosyncratic views of non-competition agreements and, specifically, its public policy objections to such agreements, on sister States. The Commerce Clause "follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing . . . lawful conduct in other States." *Gore*, 517 U.S. at 572; *see also State Farm*, 538 U.S. at 409 ("[A] State cannot punish a defendant for conduct that may have been lawful where it occurred. . . . Nor . . . does the State have a legitimate concern in . . . unlawful acts committed outside of its jurisdiction."); *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer,* 165 F.3d 1151, 1153 (7th Cir. 1999) (per curiam) ("No state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders.") (citations omitted). This Court's decisions therefore "reflect the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 335-36.

Consistent with this end, the Commerce Clause "has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden" interstate commerce. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 98 (1994). The dormant or negative Commerce Clause "prohibits state . . . regulation . . . that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *General Motors Corp. v. Tracy,*

519 U.S. 278, 287 (1997) (citations and quotations omitted). "Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336-37.

It is well-established that "a statute [or judicial interpretation of state law] that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336.[10] Moreover, "the practical effect of [the state law] . . . must be evaluated not only by considering the consequences of the [law] itself, *but also by considering how the challenged [law] may interact with the legitimate regulatory regimes of other States. . . .*" *Id.* In the end, a state law "that violates the extraterritoriality ban is per se invalid." *Dean Foods Co. v. Brancel*, 187 F.3d 609, 616 (7th Cir. 1999) (citing *Healy*, 491 U.S. at 336) (emphasis added).

The "critical inquiry" therefore is "whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. Here, the Eleventh Circuit's expansive application of Georgia contract law has the "practical effect" of extraterritorially regulating the contractual rights and obligations of Petitioner and

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10. Judicial decisions are, of course, part of the "law" of a State. *See Gore*, 517 U.S. at 573 n.17 ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."); *see also Erie*, 304 U.S. at 78 (explaining that the "law" of state is "the law of the state [as] declared by its Legislature in a statute or by its highest court in a decision"); *United States v. Santee Sioux Tribe*, 135 F.3d 558, 565 (8th Cir. 1998) (quoting *Comm'n v. Estate of Bosch*, 387 U.S. 456, 464 (1967)) ("The United States Supreme Court has pronounced that 'judicial decisions' are laws of the state within the meaning of the Rules of Decision Act.").

Respondents throughout the Nation and inducing future out-of-state accommodations by other contracting parties seeking to protect their voluntary agreements. It is beyond dispute that the Eleventh Circuit's invocation of Georgia law to *invalidate* a non-competition agreement entered into in interstate commerce (as distinguished from the district court's narrow refusal to *enforce* the non-compete agreement within Georgia) regulates conduct beyond the State's borders. The Eleventh Circuit declared that its judgment would have preclusive effect nationwide. *See* Pet. 21a-22a. Consequently, by invoking Georgia law to void the contract and project the declaratory judgment nationwide, the Eleventh Circuit has imposed Georgia's public policy choice on the other 49 States. This is precisely the kind of extraterritorial application of state law that the Commerce Clause forbids.

The Court's decision in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), illustrates this point. There, the Court addressed the constitutionality of the Illinois Takeover Act (the "Act") which, "unless complied with, . . . sought to prevent MITE from making its [takeover] offer and concluding interstate transactions not only with . . . stockholders living in Illinois, but also with those living in other States and having no connection with Illinois." *Id.* at 642. Hence, "the Illinois law on its face would apply even if not a single one of [the] shareholders were a resident of Illinois, since the Act applies to every tender offer for a corporation meeting two of the following conditions: the corporation has its principal executive office in Illinois, is organized under Illinois laws, or has at least 10% of its stated capital and paid-in surplus represented in Illinois." *Id.*

In the *Edgar* Court's view, the Act "directly regulate[d] transactions which take place across state lines, even if wholly outside the State of Illinois." *Id.* at 641. The Court therefore found that the Act was "a direct restraint on interstate commerce" with "a sweeping extraterritorial

effect." *Id.* at 642. "The most obvious burden the Illinois Act imposes on interstate commerce arises from the statute's previously described nationwide reach which purports to give Illinois the power to determine whether a tender offer may proceed anywhere. The effects of allowing the Illinois Secretary of State to block a nationwide tender offer are substantial." *Id.* at 643; *see also Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) ("New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there.").

The Georgia law of non-compete agreements is no different. Under the Eleventh Circuit's reasoning, even if sophisticated parties to an interstate non-compete agreement have agreed to regulate their disputes with reference to the law of a particular State by adopting a choice-of-law provision, a party can avoid the contract by establishing minimum contacts with Georgia, seeking a declaration that the agreement is void, and negating the agreement in every other State in the Union. Thus, based on a far less substantial foundation than even the tenuous corporate connections at issue in *Edgar*, once a party succeeds in bringing Georgia law to bear on the contract, the resulting decision has "a nationwide reach" which effectively grants Georgia "the power to determine" whether an interstate contract is valid anywhere. 457 U.S. at 643.[11] For these reasons as well,

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11. Other courts have taken a far more circumspect remedial approach in similar circumstances. *See, e.g.*, *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 193 (Ky. 2001) ("Imposing the policy choice by the Commonwealth on the employment practices of our sister states should be done with great prudence and caution out of respect for the sovereignty of other states, and to avoid running afoul of the Commerce Clause of the United States Constitution."); *Campbell v. Arco Marine, Inc.*, 50 Cal. Rptr. 2d 626, 631-32 (Cal. Ct. App. 1996) ("Applying the FEHA in this situation would raise serious constitutional concerns. 'The Commerce Clause . . . precludes

(Cont'd)

certiorari should be granted to overturn the Eleventh Circuit's nationwide projection of Georgia's anomalous rule against non-compete agreements in violation of the Commerce Clause.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the petition, the Court should grant the petition on the question presented and reverse the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.") (quoting *Edgar*, 457 U.S. at 642-43).

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No. 05-274

In The

Supreme Court of the United States

MARSH & MCLENNAN COMPANIES, INC.,
Petitioner,

v.

PALMER & CAY, INC. and JAMES B. MEATHE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents' opposition all but ignores the significant issues of constitutional law and federalism presented in this case. Rather than engaging these issues or attempting to explain why they do not merit this Court's attention, respondents mischaracterize both the nature of this case and the arguments made by petitioner Marsh & McLennan ("Marsh") here and in the proceedings below.

Contrary to respondents' suggestions, this case is not about the scope of claim or issue preclusion or whether there should be an exception to the Full Faith and Credit Clause. This is the *first* lawsuit between these parties, not the second. Thus, this case has to do with the proper scope of the original judgment declaring that Marsh cannot enforce its non-solicitation agreements because of Georgia public policy. The issue of preclusive effect will not arise until the judgment is invoked in a later case. Accordingly, respondents' version of the Question Presented—"[w]hether the final judgment of a federal court sitting in Georgia . . . is *res judicata* as between those parties" (Resp. Br. i)—altogether misses the point.

The real issue in this case is whether constitutional principles of federalism and state sovereignty restrict the scope of declaratory relief when a court is applying one State's unique public policy against enforcing certain types of contracts. Because of the breadth of the Full Faith and Credit Clause—which Marsh agrees bears few exceptions—an unlimited declaratory judgment like the one entered here would effectively void the non-solicitation agreements in their entirety, even with respect to conduct in States that would

enforce the contracts as the parties intended. As the petition makes clear, this result is inconsistent with basic notions of federalism and state sovereignty as recognized in the decisions of this Court.

As we show below in Section I, respondents' attempt to recast the issue in this case cannot obscure this fundamental point. Section II rebuts respondents' suggestion that Marsh waived some of its constitutional arguments below. And Section III rebuts respondents' effort to downplay the practical significance of the issues presented.

ARGUMENT

I. Respondents are incorrect in attempting to recast this case as one that turns on principles of claim and issue preclusion rather than constitutional principles of federalism and state sovereignty.

This case gives the Court an opportunity to decide whether constitutional principles of federalism and state sovereignty limit the scope of declaratory relief when that relief is based on one State's public policy against enforcing an otherwise valid contract. As explained in the petition, the Eleventh Circuit's decision that such relief could *not* be limited to Georgia impermissibly imposes Georgia's public policy choices on other States.

Respondents make little effort to justify the expansive reach of the relief granted below. Instead, they mischaracterize the nature of this case by casting the Eleventh Circuit's decision as one "based on fundamental, straightforward claim and issue preclusion." Resp. Br. 4. Contrary to respondents' characterization, however, this case is not about whether the judgment here would be entitled to

preclusive effect in other federal and State courts. Indeed, the preclusive impact of the judgment has not been joined as an issue, and Marsh is not pressing for any limitation on the tenets of comity embodied in the Full Faith and Credit Clause (U.S. Const., art. IV, § 1).

Moreover, respondents' assertion that the nationwide declaratory judgment entered here is "required" by preclusion principles is mystifying. *See* Resp. Br. 5. Both res judicata (claim preclusion) and collateral estoppel (issue preclusion) prevent relitigating claims and issues a second time in a successive lawsuit. *See New Hampshire* v. *Maine*, 532 U.S. 742, 748-49 (2001). But Marsh is not seeking to relitigate claims or issues decided in an earlier case; instead, it is directly challenging the scope of the original declaratory relief granted by the Eleventh Circuit. Preclusion has no bearing on the propriety of the remedy fashioned in the original case.

If anything, the possible preclusive effect of the judgment in this case only underscores the need for this Court's review. If allowed to stand, and if respondents prevail in their preclusion arguments, the Eleventh Circuit's decision will operate to preclude enforcement of these non-solicitation agreements in other States that bear a closer connection both to the agreements themselves and to the offending conduct. It is one thing to say that the judgment here precludes relitigation of whether the non-solicitation agreements prevent respondent Meathe and his new employer from taking Marsh's clients in Georgia—and it certainly would. It is quite another to say that a judgment invalidating an agreement solely by operation of Georgia public policy should bind the parties from attempting to enforce the agreement even as to matters unrelated to Georgia, such as a dispute

over the recruitment of a client or employee in New York or some other State that would enforce the contracts as the parties intended.

Ordinarily, issue preclusion does not apply when the subsequent litigation concerns issues that are governed by another State's law, because variations in state law defeat the requirement of issue identity. *See* 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRAC. & PRO. § 4417, at 449 (2d. ed 2002) (for purposes of preclusion, issues are not identical if the second action involves application of a different legal standard); *accord Boomer* v. *AT&T Corp.*, 309 F.3d 404, 422 n.10 (7th Cir. 2002); *Eng'rs Club* v. *United States*, 791 F.2d 686, 688 (9th Cir. 1986); *Guild Trust* v. *Union Pac. Land Res. Corp.*, 682 F.2d 208, 211 (10th Cir. 1982). But if a declaratory judgment based on Georgia's public policy exception cannot be limited in scope to the State of Georgia—as the Eleventh Circuit held in this case—then the Georgia law will be projected well outside the State to control transactions everywhere else as well. Thus, the potential preclusive effect of the decision below only underscores its unconstitutionality.

Nor is there any merit to respondents' attempt to bolster their position by asserting that the Eleventh Circuit's decision "is consistent with Constitutional Full Faith and Credit requirements applicable to state court judgments." Resp. Br. 5. To the contrary, the Eleventh Circuit's decision flouts this Court's decisions under the Full Faith and Credit Clause by allowing Georgia to trump the laws of its sister States based on its own policy judgments. As this Court has made clear, full faith and credit "does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."

Nevada v. *Hall*, 440 U.S. 410, 423-24 (1979) (quoting *Pac. Employers Ins. Co.* v. *Indus. Accident Comm'n*, 306 U.S. 493, 504-05 (1939)). Yet the broad declaratory judgment mandated by the Eleventh Circuit in this case permits Georgia to impose its unique policy judgments on other States merely because Meathe and his new employer were able to beat Marsh to the courthouse and subject them to suit in Georgia. This is flatly inconsistent with this Court's decisions and provides yet another reason for plenary review.

II. This Court can and should consider all the constitutional implications of the Eleventh Circuit's decision.

Contrary to respondents' repeated suggestions, the federalism and state sovereignty issues presented in the petition were fully preserved in the proceedings below. After the district court declared that the non-solicitation agreements were "unenforceable within the State of Georgia" (App. 43a) and granted respondents' motion to enjoin enforcement of the agreements "against Meathe in Georgia" (App. 43a-44a), the parties argued at length in the Eleventh Circuit about whether this geographical limitation was appropriate under—or in fact required by—federal law. At that time, the controlling case on this issue in the Eleventh Circuit was *Keener* v. *Convergys Corp.*, 342 F.3d 1264 (11th Cir. 2003), which held that Georgia law could not be used to enjoin the enforcement of a non-solicitation agreement nationwide. *See id.* at 1269 ("Georgia cannot in effect apply its public policy decisions nationwide—the public policy of Georgia is not that everywhere."). Marsh relied heavily on *Keener* in arguing that "no Georgia court may bootstrap Georgia's public policy on restrictive covenants into a *nationwide* declaration that a particular restrictive covenant is unenforceable

everywhere" and contended that the panel in this case was not free to ignore or overrule *Keener*. Consol. Resp. to Cross-Appeal & Reply Br. at 24 *et seq.*

Moreover, when the Eleventh Circuit refused to apply *Keener* with respect to the declaratory judgment, Marsh argued strenuously that this new rule of Eleventh Circuit law "violate[d] settled constitutional principles governing relationships among the various sovereigns that make up the United States," relying upon the same authorities and arguments raised in the petition for a writ of certiorari. Pet. for Panel Reh'g & Reh'g En Banc at 13-15. Both these arguments and those made in the briefs on the merits of the appeal show that Marsh fully preserved the federalism and state sovereignty issues now presented to this Court.

Respondents also mischaracterize the record when they state that Marsh "conced[ed] in the District Court at oral argument that Georgia law applied" and then "did not contend on appeal that it was error for the District Court to apply Georgia law." Resp. Br. 4. In fact, Marsh argued from the beginning that New York law, rather than Georgia law, could and should govern these agreements. *See, e.g.*, Opp. to Pl.'s Mot. for J. on Pleadings at 6 n.3. Far from agreeing to the application of Georgia law, Marsh acknowledged only that, under Georgia *choice-of-law rules*, Georgia courts first determine whether the application of the choice-of-law provision would have a result that is inconsistent with Georgia public policy, and if so, they go no further in terms of choice-of-law analysis. *See, e.g.*, Hrg. Tr. 3 (Oct. 27, 2003). And on appeal—as now—Marsh's central argument was always that Georgia law cannot and does not govern the enforceability of contracts *outside* Georgia. Thus, in the district court as well as

the court of appeals, Marsh preserved the issue presented in the petition.

III. The decision below has broad and damaging consequences for U.S. commerce.

In their effort to underplay the consequences of the Eleventh Circuit's decision, respondents offer little more than the bare assertion that it will not deprive employers of the economic benefits of non-solicitation agreements. Resp. Br. 11. This assertion is simply wrong.

Contrary to respondents' suggestion (Resp. Br. 2, 9), the Eleventh Circuit's rule is not limited to cases in which the party seeking the declaratory relief is a resident of Georgia. Although Meathe and his new employer are both residents of Georgia, the Eleventh Circuit's reasoning did not depend on their *residency*; it depended on their *choice of forum*. Under the Eleventh Circuit's decision, a plaintiff with no connection to Georgia could submit to the jurisdiction of the Georgia courts by filing a complaint. And as long as the defendant is subject to jurisdiction in the Georgia, the forum State's public policy would trump the parties' contractual choice of law, even if the contract itself—both in its formation and in its enforcement—had nothing to do with Georgia.

Thus, while respondents are correct that "Georgia courts are not open to 'just anyone'" (Resp. Br. 2)—and Marsh has never suggested that they were—the only requirement that the Eleventh Circuit's decision imposes for nationwide relief is that the defendant must have transacted some business in Georgia.

Indeed, respondents' own lawsuit illustrates the danger of the Eleventh Circuit's rule. Respondents contend that the issue here is "whether respondent

Meathe, a Georgia resident, can seek a Georgia court's protection when a corporation *seeks to enforce a contract in Georgia* that is unenforceable under Georgia law and public policy." Resp. Br. 9 (emphasis added). If respondents were truly seeking relief *only* from Marsh's supposed attempt to "enforce a contract in Georgia" (*id.*), then the Eleventh Circuit reached well beyond the scope of the controversy when it held that the declaratory judgment could not be limited to the enforcement of the contract in Georgia. But in any event, it was *respondents* who brought this dispute to Georgia—notwithstanding that Marsh had never attempted to enforce the contract "in Georgia"—and then obtained a declaratory judgment that was not limited to Georgia. Thus, the contract's enforceability nationwide turned on nothing more than the fact that respondents won the race to the courthouse.

Finally, the rule Marsh seeks in this case does not require endless relitigation of claims, as respondents suggest. Resp. Br. 11. Marsh does not contend that the enforceability of a restrictive covenant should ordinarily be litigated on a State-by-State basis. To the contrary, the contract in this case provided that it would be governed by New York law, and thus the enforceability of that contract should ordinarily have been litigated only once: in a court that applies the law chosen by the parties. A court that has jurisdiction over the parties and that applies the choice-of-law provision in the contract is free to enter declaratory relief that holds the contract "enforceable" or not, without any geographical limitation. But under the constitutional principles discussed above, a court that *refuses* to honor the contractual choice of law based on

the forum State's public policy cannot provide relief beyond that State.

It was respondents' choice—and almost certainly a deliberate one—to file their lawsuit in Georgia rather than in a court that would have given effect to the contractual choice of law provision. Having made that choice, they cannot complain about any "burden" they will suffer if the relief they are able to obtain based on Georgia public policy is limited to Georgia.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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